(2)

Supreme Court, U.S.
FILED

No. 03-1587 MAY 19 2004

OFFICE OF THE CLERK

In the Supreme Court of the United States

NICOLAS ESTIVERNE
PETITIONER

VS.

HIBERNIA CORPORATION, PAULA EADY
AND ST PAUL FIRE AND
MARINE INSURANCE COMPANY
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Louisiana State Supreme Court has the authority to provide immunity to all Banks and all Financial Institutions anywhere in the United States or wherever a Lawyer who is licensed in the State of Louisiana and his or her spouse do their Banking, from liability when such Banks or Financial Institutions release the Lawyer and/or his spouse records without the benefit of a proper subpoena or in violation of the State of Louisiana Revised Statute R.S. 6:333 ?

2. Whether or not Rule XIX, Section 28 & 29 is too broad and over reaching ?

3. Whether or not a Lawyer and his or her spouse are entitled to the Due Process and Equal Protection provided by the 14th Amendment to the United States Constitution in relation to their Finances and/or their Personal and Private Banking matters ?

4. Whether the Louisiana State Supreme Court rule XIX that requires anyone who, acquires a License to practice Law in the State of Louisiana automatically agrees to give up any and all Privacy rights that they and their spouse may have when it comes to their Private Finances is Constitutional ?

II.

LIST OF ALL PARTIES

1. Nicolas Estiverne

Pro Se Petitioner
2426 Louisiana Avenue
New Orleans, Louisiana, 70115

2. Hibernia Corporation, Paula Eady and St Paul Fire and Marine Insurance Company

Represented by : Joseph B. Morton, III
Duplass, Zwain, Bourgeois & Morton
3838 N. Causeway Boulevard,
29th Floor
Metairie, Louisiana, 70002

All parties have been served pursuant to Supreme Court Rule 29.3.

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OPINIONS BELOW

The Louisiana State Supreme Court decided this case on the 20th day of February, 2004. Petitioner herein did not request a Rehearing. The case has not been published as of the filing of this Petition for Writ of Certiorari. The opinions of the Louisiana State Supreme Court , the Louisiana Fourth Circuit Court of Appeals and the judgment of the Trial Court are reprinted in the Appendices.

VI.

STATEMENT OF JURISDICTION

This Appeal is taken pursuant to Title 28, United States Code, Section 1257(2); Federal Code Annotated, Title 28 Section 1257(2).

This petition was filed within ninety days of the date of the entry of judgment by the Louisiana State Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are involved in this case:

United States Constitution, Fourth and Fourteenth amendments

The Fourth Amendment to the United States

Constitution provides in pertinent part:

The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated .....

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

[No] State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Rule XIX Sections 28 (B) and (C) and 29 (A) of the Rules for Lawyer Disciplinary Enforcement of the Louisiana Supreme Court Rules provide in pertinent part:

Rule XIX Sec. 28(B): [E]very Lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be conclusively deemed to have consented to the production by the depository institution of records of all financial accounts maintained by the Lawyer in any Bank or similar institution.

Rule XIX Sec. 28(C): [A] request by Disciplinary Counsel directed to a Bank or other Financial institution for production of records pursuant to this section shall certify that the request is issued in accordance with the requirements of this Section and Section 29 of these Rules of Lawyer Disciplinary Enforcement.

Rule XIX Sec. 29 (A): [W]henever Disciplinary Counsel has probable cause* * *Disciplinary Counsel shall request the approval of the Chair of a hearing committee selected in order from the roster established by the Board to initiate investigation for the purpose of verifying the accuracy and integrity of all accounts maintained by the Lawyer in any Bank or similar institution .....

VIII.

STATEMENT OF THE CASE

The Louisiana Attorney Disciplinary began an investigation of a complaint filed by one of Petitioner's former client[1], in 1995, about her case allegedly having been settled without her permission. The Office of Disciplinary Counsel inquired about an amount of $2400.00 that the defendant in that client's case had paid to settle the matter. Petitioner herein informed the Disciplinary Counsel that he had resigned from the client's case, and that the case was still an opened case, and that the $2400.00 was returned to the defendant, and a judgment was signed by the Court where the case was filed, granting the motion to withdraw from the case. The Disciplinary Counsel asked for the evidence that the money and a judgment was signed by the Court where the case was filed, granting the motion to withdraw from the case.

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[1]At all time herein, Petitioner was an Attorney licensed to practice law in the State of Louisiana. Petitioner has since then resigned from the Practice of Law. *In Re Estiverne*, 200-2501 (La. 9/20/00), 767 So. 2d 39.

The Disciplinary Counsel asked for the evidence that the money was returned to the defendant and Petitioner herein produce a check that was written on a Joint account between Petitioner and his wife.

The Disciplinary Counsel sent a letter to Petitioner (dated 9/25/98)[2] wherein he stated that he intended to issue a subpoena for Petitioner's financial records. The letter did not give any Account numbers except some routing numbers. The Appellee Hibernia Corporation received by mail a copy of a subpoena which requested Petitioner's Trust Account, with a Routing number but not the actual account number. One of the defendant Hibernia Corporation's employee called the: Disciplinary Counsel and stated to him that the number on the subpoena was wrong, and that he could not locate any account with such numbers. The Disciplinary Counsel dictated some numbers to the Bank's employee on the telephone and the employee delivered all the financial records that belonged to the Petitioner, including the records of the Joint Account that Petitioner had with his wife. Petitioner found out, through the Discovery Process, at a later date that the Disciplinary Counsel was in possession of all those records, and Petitioner filed suit against, Hibernia National Bank in the United States District Court for the Eastern District of Louisiana, under #00-0337, Sec. "F" for Violation of Privacy. The Court dismissed the case for "Lack of Subject Matter Jurisdiction". Petitioner filed a new suit in State Court against Hibernia

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2 See Appendix

Corporation, Paula Eady and St Paul Fire and Marine Insurance Company, Hibernia Corporation's liability insurer. The defendant and Petitioner filed Motions for Summary Judgments and the trial Court denied the Motions[3]. The defendants filed a Writ of Review to the Louisiana Fourth Circuit Court of Appeals[4], and the Court affirmed the Trial Court with one Judge dissenting[5]. The defendants filed for a Writ of Certiorari and Review to the Louisiana State Supreme Court and the Court reversed the judgment of the Trial Court.

The Louisiana State Supreme Court stated that it had adopted the dissenting opinion of the Judge of the Fourth Circuit Court of Appeals Supra in Appendix # 5, which states in part that Petitioner herein should have filed a Motion to Quash the subpoena when he found out that the Joint Account with his wife was being requested, which was "Impossible" to do, considering that the request was made by telephone, unbeknownst to the Petitioner. The Louisiana State Supreme Court disregarded all the requirements of the Louisiana Code of Civil Procedure, the Rule XIX that it is enforcing and the Louisiana Revised Statute R.S. 6:333[6], the United States Constitution 4th and 14th Amendments

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[3] See Appendix

[4] See Appendix

[5] See Appendix

[6] See Appendix

and all the Privacy Laws that exist for the protection of all citizens of this nation and this State.

IX.

REASONS FOR GRANTING THE PETITION

A. THE QUESTIONS PRESENTED SHOW A BLATANT DISREGARD BY THE LOUISIANA STATE SUPREME COURT FOR THE RIGHTS OF ATTORNEYS AND THEIR SPOUSES CONCERNING PERSONAL FINANCES

Courts have a constitutional obligation to identify constitutional violations and also to remedy such violations. The Louisiana State Supreme Court was derelict in its duty for encouraging the Louisiana Attorney Disciplinary Counsel, appointed by that Court, to violate its own rules and the laws of the State of Louisiana, the United States Constitution, 4th and 14th amendments, and the Code of Civil Procedure of the State of Louisiana, enacted by the Legislature. The writ of Certiorari is appropriate in this case to determine whether or not the Louisiana State Supreme Court can create a Rule that requires anyone who is practicing law in the State of Louisiana to consent automatically to give up any and all Privacy Rights they may be entitled to in matters involving their finances and that of their spouses, in violation of the Due Process Clause of the 14th

Amendment to the United States Constitution, and in conflict with *Shelton v. Tucker*[7].

The Fourth Amendment to the United States Constitution protects against unreasonable search and seizure. Rule XIX Sec. 28(B) and (C) and Rule XIX Sec. 29(A) are vague and too broad and overreaching in their scope. This Honorable Court states in *Benton v. U.S.*[8], that Statutes authorizing search and seizure must be strictly construed and complied with. The fact that the 4th Amendment provides such protection to all citizens is sufficient for this Honorable Court to grant Certiorari because of the carelessness shown by the Louisiana State Supreme Court when it allows the Louisiana Attorney Disciplinary Counsel to obtain any licensed Attorney's Financial Records without the use of a proper subpoena or by only making a telephone call to any Banks or similar institution, and by granting Immunity to all Banks or similar Institutions who release a Lawyer's Financial Records illegally, whether the records are joint Financial Records between a Lawyer and his or her Spouse.

The Louisiana Revised Statutes R.S. 6:333 is supposed to protect all citizens of the State of Louisiana and it establishes the procedure that all Louisiana Banks or similar Institution must follow in releasing Financial Records

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[7] *Shelton v. Tucker,* (1960) 364 U.S. 479, 5 L Ed 2d 231, 81 S Ct 247

[8] *Benton v. U.S.* (1934), 70 F 2d 24, cert den 292 U.S. 642, 54 S Ct 778

of their customers[9], but the Louisiana State Supreme Court exempt Lawyers' spouses and the Lawyers from that protection, in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution and the case of *Thomas Cusack Co. v. Chicago*[10]. The Louisiana State Supreme Court changed the issues in the original case from a violation of State Laws by a Bank to a case where the Louisiana Attorney Disciplinary Counsel, although not a Party to the suit, became the Central issue of the case, giving in the process the freedom to all Banks or Financial Institutions where a licensed Lawyer in Louisiana and his spouse do their Banking, to violate the laws of their States when it comes to Bank Accounts of Lawyers from Louisiana, according to Rule XIX Sec. 28(B) and (C) and Rule XIX Sec. 29(A) of the Louisiana Supreme Court Rules.

B. SUMMARY OF ARGUMENT

The best summary of the argument presented herein is the dissenting opinion by Justice Bernette Johnson which states as follows:

" It is clear that pursuant to the Supreme Court Rule XIX Section 28 and 29, the Office of Disciplinary Counsel has the power to request the financial records of a Lawyer. However, in this case, the Office of Disciplinary Counsel

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[9] See Appendix R.S. 6:333

[10] 242 US 526, 61 L Ed 472, 37 S Ct 190

(ODC) served Hibernia National Bank with a subpoena duces tecum, requesting records from Mr. Estiverne's client account. The account listed on the subpoena was incorrect, so Hibernia's employee Brion Workman, telephoned the ODC. Following a conversation with Eric Barefield, the Deputy Disciplinary Counsel listed on the subpoena, Mr Workman forwarded to the ODC copies of statements from Mr. Estiverne's client account as well as statements from Mr. Estiverne's and his wife's personal account.

The dissenting Court of Appeal opinion states, in pertinent part:

> " In the case at Bar, Plaintiff/respondent, Nicholas Estiverne, was aware of the subpoena issued by the disciplinary counsel to Hibernia Bank.... The plaintiff/respondent, if he did not want the records produced, was obligated to attempt to quash of [sic] the subpoena. Mr. Estiverne failed to try to quash the subpoena."

Whether Mr. Estiverne was "aware of the subpoena issued" by the ODC is of no moment, as the request for records from the personal account was not contained in the subpoena. The failure to give Mr. Estiverne notice that the ODC was requesting financial records regarding his and his wife's personal account served to deprive him of the right to attempt to quash the subpoena."

The dissenting opinion above illustrates the broadness and vagueness of the Rules XIX of the Louisiana Supreme Court Rules.

X.

CONCLUSION

The petition for Writ of Certiorari should be granted and the judgment of the Louisiana State Supreme Court should be reversed and the case should be remanded for further proceedings . Alternatively, the Court should grant Plenary Review of the Judgment below.

RESPECTFULLY SUBMITTED:

By:

NICOLAS ESTIVERNE- PRO SE
2426 LOUISIANA AVENUE
NEW ORLEANS, LOUISIANA, 70115
TELEPHONE: (504) 895-9076

APPENDIX A

Letter dated September 25, 1998 from the Louisiana Attorney Disciplinary Counsel to Nicolas Estiverne

Dear Mr. Estiverne:

This is to notify you as per Louisiana Revised Statute Title 9: 3571 and Louisiana Revised Statute 6: 333, the Louisiana Attorney Disciplinary Board intends to issue a subpoena Duces Tecum for:

All bank records from the account of Nicolas Estiverne and Associates Client's Account No. 06500009002 for the period of May 9, 1995 to the present, including but not limited to: All monthly statements, all canceled checks, and all instruments of deposit.

This office intends to subpoena these records for the subpoena which is set for November 13, 1998 at 9 ;00 a.m. at the Office of the Disciplinary Counsel, 2800 Veterans Memorial Blvd., Suite 310, Metairie, La. 70002.

Melissia A. Buckhalter
Deputy Disciplinary Counsel

APPENDIX B

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 2000-13428 DIVISION "C" SECTION 6

NICOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, ET AL.

JUDGMENT

This matter came for hearing on Motion for Partial Summary Judgment filed herein on behalf of Nicolas Estiverne and on Motion for Summary Judgment filed herein on behalf of Paula Eady, Hibernia Corporation and St Paul Fire and Marine Insurance Company.

After considering the pleadings, the argument of Counsel and the law:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed on behalf of Nicolas Estiverne and the Motion for Summary Judgment filed on behalf of Paula Eady, Hibernia Corporation and St Paul Fire and Marine Insurance Company be, and the same

are hereby denied.

JUDGMENT READ, RENDERED AND SIGNED in New Orleans, Louisiana, this 4th day of September, 2003.

/s/ Judge Roland L. Belsome

APPENDIX C

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA
NO. 2003-C-1850
NICOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, ET AL.

IN RE: PAULA EADY, ET AL.
APPLYING FOR: SUPERVISORY WRIT
DIRECTED TO: HONORABLE
ROLAND L. BELSOME, JUDGE
CIVIL DISTRICT COURT, ORLEANS, PARIS
DIVISION "C", 2000-13428

WRIT DENIED

We find that the trial court did not err in denying the motion for summary judgment.

New Orleans, Louisiana this day of NOV 18, 2003

/s/ JUDGE TERRI LOVE

/s/ JUDGE MAX N. TOBIAS
Dissents and assigns reasons

/s/ JUDGE DAVID S. GORBATY

APPENDIX D

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA
NO. 2003-C-1850
NICOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, ET AL.

TOBIAS, J., DISSENTS AND ASSIGNS REASONS

I respectfully dissent.

Rule XIX Sec. 28 B and C of the Rules of Disciplinary Enforcement promulgated by the Supreme Court of Louisiana state:

B. **Access to Lawyers Financial Records.** Every Lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be *conclusively deemed to have consented* to the production by the depository institution of records of all financial accounts maintained by the lawyer in any bank or similar institution.

C. **Request for Production of Records.** A request by Disciplinary Counsel directed to a bank or other financial institution for production of records pursuant to this Section shall certify that the request is issued in accordance with the requirements of this section and section 29 of these

Rules of Lawyer Disciplinary Enforcement. [Emphasis in italics and underlined added.]

Rule XIX, Sec. 29 of the Rules of Disciplinary Enforcement states:

A. **Generally.** Whenever disciplinary counsel has probable cause to believe that financial accounts of a lawyer that contain, should contain, or have contained funds belonging to clients or third parties have not been properly maintained or that funds have not been properly handled, disciplinary counsel shall request the approval of the chair of a hearing committee selected in order from the roster established by the board to initiate an investigation for the purpose of verifying the accuracy and integrity of all accounts maintained by the lawyer in any bank or similar institution. If the reviewing member approves, counsel shall proceed to verify the accuracy of the financial accounts. If the reviewing member denies approval, counsel may submit the request for approval to one other chair of a hearing committee selected in order from the roster established by the board.

B. **Confidentiality.** Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer-client privilege.

The Supreme Court of Louisiana has full authority to regulate and direct the practice of law in this state. La. Const. art. V Sec. 5; La. R.S. 37:213; *LSBA v. Edwins,* 540

So. 2d 294 (La. 1989); *Saucier v. Hayes Diary Products, Inc.*, 373 So. 2d 102, 109, 115 (La. 1978); *Meunier v. Bernich*, 170 So. 567 (La. App. Orleans 1936). In my view, their rules, when read with La. R.S. 6:333 C, clearly direct that when subpoena duces tecum is directed by disciplinary counsel to a financial institution for any bank record of a lawyer licensed to practice in Louisiana, the bank is obligated to comply and the lawyer is deemed to have consented to the bank providing the information.

In the case at bar, plaintiff/respondent, Nicolas Estiverne,[1] was aware of the subpoena issued by disciplinary counsel to Hibernia National Bank. The bank was obligated to comply with the subpoena regardless of technical errors contained within the subpoena because the Supreme Court rule grants to disciplinary counsel the right to obtain all financial records of a lawyer maintained by the financial institution. The plaintiff/respondent, if he did not want the records produced, was obligated to attempt to quash of the subpoena. Mr. Estiverne failed to try to quash the subpoena.

I would, therefore, grant the writ, and reverse the decision of the trial court, thereby granting the relators' motion for summary judgment.

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[1]At the time the subpoena duces tecum issued, Mr. Estiverne was a lawyer admitted to the practice of law in Louisiana. With the permission of the Supreme Court of Louisiana, he subsequently permanently resigned from the Louisiana State Bar Association, provided that he did not seek readmission to the Bar of Louisiana or any other State. In *re Estiverne, 2000-2501 (La. 9/20/00)*, 767 So. 2d 39. He subsequently petitioned the Supreme Court to withdraw his voluntary resignation. *In re Estiverne*, 2002-1018 (La. *5/24/02)*, 816 So. 2d 295.

APPENDIX E

THE SUPREME COURT OF THE STATE OF LOUISIANA

NICOLAS ESTIVERNE

vs.

HIBERNIA CORPORATION, ET AL. NO. 2003-CC-3411

IN RE: Hibernia Corporation et al; Eady, Paula; St. Paul Fire & Marine Insurance Co.; - Defendant (s); Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. C, Nos. 2000-13428; to the Court of Appeal, Fourth Circuit, No. 2003-C-1850

February 20, 2004

Granted. The judgment of the trial court is reversed. Summary judgment is granted in favor of relators for the reasons assigned in the opinion of the dissenting judge in the court of appeal.

CDK
JPV
CDT
JTK

CALOGERO, C. J., would grant and docket.
JOHNSON, J. Dissents with reasons
WEIMER, J., concurs

Supreme Court of Louisiana February 20, 2004

/s/ Katherine A. Fontana
Deputy Clerk of Court, For the Court

APPENDIX F

SUPREME COURT OF LOUISIANA
NO. 03-CC-3411

NICOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

JOHNSON, J., would deny the writ application for the following reasons:

It is clear that pursuant to Supreme Court Rule XIX, Sec. 28 and 29, the ODC has the power to request the financial records of a lawyer. However, in this case, the Office of Disciplinary Counsel ("ODC") served Hibernia National Bank with a subpoena duces tecum, requesting records from Mr. Estiverne's client account. The account number listed on the subpoena was incorrect, so Hibernia's employee, Brion Workman, telephoned the ODC. Following a conversation with Eric Barefield, the Deputy disciplinary counsel listed on the subpoena, Mr. Workman forwarded to the ODC copies of statements from Mr. Estivere's client account, as well as statements from Mr. Estiverne's and his wife's personal account.

The dissenting court of appeal opinion states, in pertinent part:

> In the case at bar, plaintiff/respondent, Nicholas Estiverne, was aware of the subpoena issued by disciplinary counsel to Hibernia Bank.... The plaintiff/respondent, if he did not want the records produced, was obligated to attempt to quash of [sic.] the subpoena. Mr. Estivere failed to try to quash the subpoena.

Whether Mr. Estivere was "aware of the subpoena issued" by the ODC is of no moment, as the request for records from the personal account was not contained in the subpoena. The failure to give Mr. Estivere notice that the ODC was requesting financial records regarding his wife's personal account served to deprive him of the right to attempt to quash the subpoena.

For the foregoing reasons, I would deny the bank's writ application, and allow the trial court's decision to stand.

APPENDIX G

LOUISIANA REVISED STATUTE R.S. 6:333(C)

A Bank may disclose financial records pursuant to a disclosure demand if each of the following conditions is met:

(1) The disclosure demand is served on the Bank's President, one of the Bank's registered agents for service of process, or if applicable, on the Bank's Counsel of record unless such service on such individuals is expressly waived by the Bank.

(2) Prior to the return date, the person requesting the issuance of the disclosure demand furnishes the Bank with an affidavit certifying both of the following:

a) That such disclosure demand, or a certify copy thereof, has also been personally served upon each customer named in the disclosure demand to whom the financial records being sought pertain or upon such customer's Counsel of record in accordance with Subsection D of this section.

b) That such service was made at least (15) business days prior to the return date.

(3) The Bank has not received written notice that a customer to whom the financial records pertain has taken legal action to enjoin or otherwise restrain the release of the financial records.